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No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1983

THE BOARD OF EDUCATION OF THE CITY OF OKLAHOMA CITY, STATE OF OKLAHOMA,
Appellant,

v.

THE NATIONAL GAY TASK FORCE,
Appellee.

On Appeal from the United States Court of Appeals, Tenth Circuit

JURISDICTIONAL STATEMENT

Larry Lewis
Counsel of Record
Suite 410
4001 N. Lincoln
Oklahoma City, Oklahoma 73105

James B. Croy
P. O. Box 10798
Midwest City, Oklahoma 73140

Attorneys for Appellant

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QUESTIONS PRESENTED

Whether the state statute on its face unconstitutionally infringes upon protected free speech rights of public school teachers.

Whether the state statute is so facially overbroad as to infringe upon the protected free speech rights of public school teachers.

Whether if the state statute is facially overbroad the statute can be so narrowly construed as to uphold the statute's constitutionality.

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INTRODUCTION

The Board of Education of the City of Oklahoma City, State of Oklahoma, appeals section II of the majority opinion of the United States Court of Appeals, Tenth Circuit, No. 82-1912, which was issued March 14, 1984. Section II of the opinion held a portion of the Oklahoma teacher employment termination statute, 70 Okla. Stat. Sec. 6-103.15, was *facially* unconstitutional in being so overbroad as to infringe upon protected free speech rights. The statute held to be unconstitutional permitted school boards to refuse to hire or to terminate the employment of teachers who have so engaged in "public homosexual conduct" as to be unfit as public school teachers.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Oklahoma, Judge Luther Eubanks, which appears as Appendix B hereto, was issued July 29, 1982. That opinion was not reported. The opinion held that the statute did not facially violate appellee member's rights of free speech or free association; was not vague or overbroad; did not interfere with privacy rights; did not violate equal protection of the law; and did not violate the Establishment Clause:

The opinion of the United States Court of Appeals for the Tenth Cricuit, which appears as Appendix A hereto, was issued March 14, 1984, and is reported at 729 F.2d 1270. The Tenth Circuit affirmed the District Court opinion with the exception that section II of the opinion found that the statute facially infringed upon protected free speech and was thus overbroad. A dissenting opinion argued that the statute did not facially proscribe protected speech and was thus not overbroad.

JURISDICTION

District Court jurisdiction was based upon 28 U.S.C. Sec. 2201 and 28 U.S.C. Sec. 1331, the complaint praying for a Declaratory Judgment declaring the statute was facially unconstitutional.

The final opinion of the Tenth Circuit was issued March 14, 1984, and a Notice of Appeal to the Supreme Court was filed with the Tenth Circuit on May 11, 1984. Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(2) since the Tenth Circuit held an Oklahoma statute on its face violated provisions of the United States Constitution.

THE STATE STATUTE FOUND TO BE FACIALLY UNCONSTITUTIONAL

The challenged statute, 70 Okla. Stat. Sec. 6-103.15, provides:

A. As used in this section:

1. "Public homosexual activity" means the commission of an act defined in Section 886 of Title 21 of the Oklahoma Statutes, if such act is:
   a. committed with a person of the same sex, and
   b. indiscreet and not practiced in private;
2. "Public homosexual conduct" means advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees; and
3. "Teacher" means a person as defined in Section 1-116 of Title 70 of the Oklahoma Statutes.

B. In addition to any ground set forth in Section 6-103 of Title 70 of the Oklahoma Statutes, a teacher, student teacher or a teachers' aide may be refused employment, or reemployment, dismissed, or suspended after a finding that the teacher or teachers' aide has:

1. Engaged in public homosexual conduct or activity;
2. Has been rendered unfit, because of such conduct or activity, to hold a position as a teacher, student teacher or teachers' aide.

C. The following factors will be considered in making the determination whether the teacher, student teacher or teachers' aide has been rendered unfit for his position:

1. The likelihood that the activity or conduct may adversely affect students or school employees;
2. The proximity in time or place the activity or conduct to the teacher's, student teacher's or teacher's' aide's official duties.
3. Any extenuating or aggravating circumstances; and,
4. Whether the conduct or activity is of a repeated or continuing nature which tends to encourage or dispose school children toward similar conduct or activity.

The statute defines "public homosexual activity" as being the commission of the act defined in Section 886 of Title 21 of the Oklahoma Statutes when that act is committed with a person of the same sex and indiscreetly and not in private. 21 Okla. Stat. Sec. 886 is Oklahoma's criminal sodomy statute. That statute provides:

> Every person who is guilty of the detestable and abominable crime against nature, committed with mankind or with a beast, is punishable by imprisonment in the penitentiary not exceeding ten (10) years.

CONSTITUTIONAL PROVISION INVOLVED

First Amendment, United States Constitution:

> Congress shall make no law . . . abridging the freedom of speech . . .

RAISING THE FEDERAL QUESTIONS

This case solely concerns federal constitutional issues.

The Appellee's complaint alleged 70 Okla. Stat. Sec. 6-103.15 was unconstitutional on its face and requested the District Court to enter a Declaratory Judgment holding the statute violated Appellee members' rights of free speech and free association, was vague and overbroad, interferred with members' privacy rights, violated equal protection of the law, and violated the Establishment Clause. The District Court rejected all of the federal constitutional claims of the Appellee.

The Tenth Circuit affirmed the holding of the District Court that the statute did not violate privacy rights, that the term "public homosexual activity" was not vague, that the statute did not violate equal protection of law, and that the statute did not offend the Establishment Clause. In Secion II of the majority opinion the circuit court reversed the portion of the District Court's opinion that the "public homosexual conduct" section of the statute was not overbroad and did not violate the free speech rights of Appellee's members.

Thus, federal constitutional issues are the total concern of this litigation.

STATEMENT OF THE CASE

This case concerns a *facial* challenge to the constitutionality of a portion of the Oklahoma teacher termination statutes. The last section of those statutes, 70 Okla. Stat. Sec. 6-103.15, empowers Oklahoma school boards to suspend, dismiss, nonrenew or refuse to employ public school teachers who solicit, impose, encourage, advocate or promote indiscreet, "homosexual activity" (sodomy) when such solicitation, imposition, encouragement, advocacy or promotion so adversely affects the teaching abilities of the solicitor, imposer, encourager, promoter or advocate as to render that teacher unfit as a public school instructor. The statute lists the considerations which are to be used by the school board in determining whether there is a "nexus" between the sodomy solicitation, etc. and teacher ineffectiveness. Those considerations are the likelihood the teacher's solicitation, etc. may adversely affect school children or school employees; the proximity in time or place of the solicitation, etc. to the teacher's duties as a public school teacher; any extenuating or aggravating circumstances involved in the solicitation; and, whether the solicitation of criminal, homosexual sodomy is of such a repeated or contining nature as to tend to encourage or dispose minor school children to commit criminal, homosexual sodomy.

Since this is a facial challenge there are no facts involved in this case. No facts have been presented that the Oklahoma City Board of Education has used the challenged statute to refuse to hire anyone or to terminate the employment of any employee. The Oklahoma City Board is a party merely because the Appellant happens to be a board

of education in Oklahoma and the Appellee needed a school board for a defendant to contest the constitutionality of the statute through a Declaratory Judgment suit.

The section of the statute which the majority circuit opinion held to be facially unconstitutional provides a school board may terminate the employment of, or refuse to hire, those who have engaged in "public homosexual conduct" to such a degree the applicant or teacher would be or is unfit as a teacher. "Public homosexual conduct" is defined in the statute as the advocating, soliciting, imposing, encouraging or promoting of public or private "homosexual activity" in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees. The statute defines "public homosexual activity" as "the commission of an act defined in Section 886 of Title 21 of the Oklahoma Statutes, if such act is: a. committed with a person of the same sex. and b. indiscreet and not practiced in private; . . . ."

The commission of an act "defined in Section 886 of Title 21" of the Oklahoma Statutes is the commission of criminal sodomy, *Carson* v. *State*, 529 P.2d 499 (Okl.Cr. 1974); *Canfield* v. *State*, 506 P.2d 987 (Okl.Cr. 1973), *appeal dismissed*, 414 U.S. 991 (1973), *rehearing denied*, 414 U.S. 1138 (1973); *Moore* v. *State*, 501 P.2d 529 (Okl.Cr. 1972), *cert. denied*, 410 U.S. 987 (1972).

Thus, the portion of the statute held by the majority of the circuit to be unconstitutional refers to the solicitation, etc. of criminal, homosexual sodomy when made in such a manner as to create a substantial risk the solicitation of criminal sodomy comes to the attention of school children

or school employees and renders a teacher unfit as a teacher after consideration of the nexus requirements listed in the statute.

THE QUESTIONS ARE SUBSTANTIAL

The questions presented in this appeal are so substantial that this Court should either reverse the majority opinion of the Tenth Circuit summarily, or, if not reversing the opinion, should require plenary consideration with briefs and oral argument.

That substantial federal constitutional questions are involved is shown by the reasoning used in the majority opinion in taking the extreme action of a federal court in holding a state statute regulating public school teachers to be unconstitutional on its face and also by the reasoning of the District Court and the dissenting circuit opinion in holding the statute is facially constitutional.

The statute which the majority circuit opinion held facially unconstitutional provides a public school teacher may be discharged after the teacher has solicited, imposed, encouraged, advocated or promoted the specific crime of sodomy with a person of the same sex when such sodomy is indiscreet and not practiced in private ("public homosexual activity") or has solicited, imposed, encouraged, advocated or promoted the specific crime of sodomy committed indiscreetly with a person of the same sex ("private homosexual activity") when the solicitation, imposition, encouragement, advocacy or promotion is made in such a manner that there is a substantial risk that such solicitation, etc., comes to the attention of minor school children or

school employees and also renders the teacher unfit as a teacher under the nexus considerations of the statute. Those nexus requirements are whether unfitness as public school teacher is shown by:

1. The likelihood the teacher's solicitation, imposition, encouragement, advocacy or promotion of criminal, homosexual sodomy may adversely affect school children or school employees;

2. The proximity in time or place of the solicitation, etc. of criminal, homosexual sodomy to the teacher's duties as a public school teacher in charge of minor school children;

3. Any extenuating or aggravating circumstances involved in the solicitation; and,

4. Whether the solicitation, etc. of criminal, homosexual sodomy is of such a repeated or continuing nature as to tend to encourage or dispose minor school children to commit criminal, homosexual sodomy.

The District Court found that the nexus considerations of the statute that bridge the solicitation of a crime with a finding of teacher unfitness meant that whatever speech rights existed in soliciting a crime were facially protected under the *Pickering* v. *Board of Education*, 391 U.S. 563 (1968) test:

> The court held (App. B, pp. 7b-8b):
>
> The statute at issue, within its definition of conduct or activity, includes certain activities which are associated with expression. However, engaging in the activities enumerated in the statute will result in discipline only where the teacher is also found to be unfit. The factors to be considered in the determination of

unfitness are akin to those factors cited in *Pickering*. The factors listed in the statute at issue are: the likelihood that the activity or conduct may adversely effect students or school employees; the proximity in time or place of the activity or conduct to the teacher's, student teacher's or teachers' aide's official duties; any extenuating or aggravating circumstances and; whether the conduct or activity is of a repeated or continuing nature which tends to encourage or dispose school children towards similar conduct or activity. As stated above, the interest cited in *Pickering* were: removing incompetent employees and maintaining discipline; preserving harmony; and maintaining personal loyalty and confidence. Therefore, based upon *Pickering*, the statute at issue presents legitimate concerns which the state may counter-balance against its employee's right to freedom of expression.

> It must be remembered that the statute was primarily written to regulate the conduct of teachers. Any restraint of free expression is merely an anciallary subject of the statute. That is why the statute speaks of unfitness rather than disruption.

The District Court further held the statute was not overbroad because only speech rendering the solicitor unfit as a teacher was proscribed. The court stated (App. B, p. 10b):

> The statute specifically states what factors are to be considered in determining whether the activity causes the teacher to be unfit. Among the factors are: the activities' adverse affect on students and school employees; proximity in time or place of the conduct to the employee's official duties; and whether the activities are of a continuing nature which tends to encourage children toward similar activity.

The majority circuit opinion reversed because under *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969), the statute does not "necessarily imply incitement to imminent action" (App. A, p. 7a) and the nexus requirements of the statute do not necessarily amount to a material and substantial interference with school operations under *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969).

Judge Barrett, in his dissenting opinion to the Tenth Circuit's majority opinion, found that the statute did not affect protected speech (App. A, pp. 11a-12a):

> Sodomy is *malum in se*, i.e., immoral and corruptible in its nature without regard to the fact of its being noticed or punished by the law of the state. It is not *malum prohibitum*, i.e., wrong only because it is forbidden by law and not involving moral turpitude. Any teacher who advocates, solicits, encourages, or promotes the practice of sodomy "in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees" is in fact and in truth inciting school children to participate in the abominable and detestable crime against nature. Such advocacy by school teachers, regardless of the situs when made, creates a substantial risk of being conveyed to school children. In my view, it does not merit any constitutional protection. There is no need to demonstrate that such conduct would bring about a material or substantial interference or disruption in the normal activities of the school. A teacher advocating the practice of sodomy is without First Amendment protection. The statute furthers an important and substantial government interest, as determined by the Oklahoma legislature, unrelated to the suppression of free speech. The incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest.

A substantial federal question is presented in the differences between the majority and dissenting circuit opinions regarding the applicability of *Brandenburg's* speech standard to an Oklahoma statute regulating public teacher fitness. The majority ruled the teacher finess statute could not facially stand because the statute was not restricted to governing speech inciting iminent lawless action. The minority opinion held *Brandenburg*, a case involving advocacy of violent means of political reform when such advocacy was not likely to incite violence, was not the proper test in assessing the alleged overbroadness of a statute regulating solicitation of a specific *malum in se* crime by a public school teacher when such solicitation renders the teacher unfit to perform the governmental function of instructing minor school children. The dissent found there was nothing abstract about a teacher promoting the commission of criminal sodomy to such an extent the teacher was not fit to instruct minor children.

A substantial constitutional question arose when the majority applied the "material and substantial" interference speech standard of *Tinker*, a case involving political expression concerning a matter of vital national interest, as the proper test in determining the facial free speech merits of a statute regulating teacher fitness of those teachers who solicit or impose the crime of sodomy, the solicitation or encouragement of criminal, homosexual sodomy not being a matter of vital national political interest. The dissenting opinion (App. A, p. 12a) found *Tinker* "a poor vehicle for the majority to rely upon," since encouragement of the practice of criminal sodomy was not a matter at the heart of the First Amendment as was political expression, and to require

proof of a substantial and material interference with school operations when a public school teacher solicits or imposes or encourages or promotes or advocates criminal sodomy "is a bow to permissiveness."

Even if *Tinker's* standard does apply, the majority circuit opinion and the District Court differ as to the statute's facial compliance with *Tinker*. The District Court found the nexus requirements of the Oklahoma statute complied with the *Pickering* guidelines on balancing free speech interests with governmental restraints and that a teacher found unfit for homosexual, criminal sodomy imposition, encouragement, solicitation, encouragement or advocacy would comply with the substantial and material interference test of *Tinker* (App. B, p. 7b).

A substantial federal issue arose when the circuit majority determined there is no substantial and material interference with school operations when a teacher is rendered unfit as a teacher after soliciting criminal sodomy in such a manner that the solicitation of criminal sodomy comes to the attention of minor school children.

A substantial constitutional issue was raised when the majority held facially overbroad a statute which does not concern an abstract doctrine about political rights but rather the solicitation, encouragement, promotion, advocacy or imposition of a specific crime of sodomy by a public school teacher when the solicitation so adversely affected the teacher's instructional abilities as to render the solicitor unfit for the public school care of minor children.

A substantial constitutional issue was raised by the dissenting opinion as to whether the solicitation, of crimi-

nal, homosexual sodomy, the imposition of criminal, homosexual sodomy, or the encouragement, promotion or advocacy of the commission of criminal, homosexual sodomy is entitled to any constitutional speech protection.

A substantial constitutional question is present in whether the Oklahoma statute on its face denies public school teacher solicitors, imposers, encouragers, promoters or advocates of criminal, homosexual sodomy of any constitutional protection.

A substantial constitutional issue arose when the circuit majority used the extreme judicial power of holding a state public employee regulation to be unconstitutional on its face.

There is a substantial constitutional question in whether, even if the statute regulating teacher fitness does touch protected free speech rights, the statute cannot be so narrowly construed by the court so as to not infringe upon such rights.

The Constitution certainly affords free speech right to public school teachers. But these rights are not absolute and may be subjected to certain restrictions, as stated, for example, in *Pickering, supra*. The State of Oklahoma has enacted a statute, through its power to regulate teaching in the public schools, providing a school board may terminate teachers who solicit, impose, encourage, promote or advocate a specific crime when such action is made with a substantial risk of coming to the attention of school children or school employees and further renders the teacher unfit as a teacher under specific nexus requirements.

The majority circuit opinion has taken the extreme step of striking down this state governmental regulation on its face. That, in itself, raises a substantial federal question. Further, the differences in the majority and dissenting opinions over constitutional interpretations are significant, as are the differences between the majority opinion and the district court opinion.

CONCLUSION

For these reasons the Court is requested to either reverse the majority circuit opinion summarily, or, if not reversing the opinion, require plenary consideration with briefs on the merits and oral argument.

Respectfully submitted,

Larry Lewis
Counsel of Record
Suite 410
4001 N. Lincoln
Oklahoma City, Oklahoma 73105

James B. Croy
P. O. Box 10798
Midwest City, Oklahoma 73140

Attorneys for Appellant

June, 1984

APPENDICES

APPENDIX A

PUBLISH

[Filed March 14, 1984]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

THE NATIONAL GAY TASK FORCE and on behalf of all teachers and principals prospectively and presently employed by the Board of Education of the City of Oklahoma City, State of Oklahoma, and who are similarly situated, Plaintiff-Appellant,	)	No. 82-1912
v.	)	
THE BOARD OF EDUCATION OF THE CITY OF OKLAHOMA CITY, STATE OF OKLAHOMA, Defendant-Appellee.	)	

Appeal from the United States District Court
For the Western District of Oklahoma
(D. C. No. CIV-80-1174-E)

William B. Rogers of the American Civil Liberties Union of Oklahoma, Oklahoma City, Oklahoma (Leonard Graff and Don Knutson of Gay Rights Advocates, Inc., San Francisco, California, with him on the brief), for Plaintiff-Appellant.

Larry Lewis, Oklahoma City, Oklahoma, for Defendant-Appellee.

Sally E. Scott, Oklahoma City, Oklahoma, filed an amicus curiae brief for the Speech Communication Association.

Fred Okrand, Laurence R. Sperber, and Susan McGreivy, Los Angeles, California, filed an amicus curiae brief for the

National Gay and Lesbian Rights Project of the American Civil Liberties Union.

E. Carrington Boggan and Rosalyn Richter, New York City, New York, filed an amicus curiae brief for the Lambda Legal Defense and Education Fund, Inc.

Before BARRETT, McKAY, and LOGAN, Circuit Judges.

LOGAN, Circuit Judge.

The National Gay Task Force (NGTF), whose membership includes teachers in the Oklahoma public school system, filed this action in the district court challenging the facial constitutional validity of Okla. Stat. tit. 70, § 6-103.15. The district court held that the statute was constituionally valid. On appeal NGTF contends that the statute violates plaintiff's members' rights to privacy and equal protection, that it is void for vagueness, that it violates the Establishment Clause, and finally, that it is overbroad.

The challenged statute, Okla. Stat. tit. 70, § 6-103.15, provides:

"A. As used in this section:

1. 'Public homosexual activity' means the commission of an act defined in Section 886 of Title 21 of the Oklahoma Statutes, if such act is:

   a. committed with a person of the same sex, and

   b. indiscreet and not practiced in private;

2. 'Public homosexual conduct' means advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees; and

3. 'Teacher' means a person as defined in Section 1-116 of Title 70 of the Oklahoma Statutes.

B. In addition to any ground set forth in Section 6-103 of Title 70 of the Oklahoma Statutes, a teacher, student teacher or a teachers' aide may be refused employment, or reemployment, dismissed, or suspended after a finding that the teacher or teachers' aide has:

1. Engaged in public homosexual conduct or activity; and

2. Has been rendered unfit, because of such conduct or activity, to hold a position as a teacher, student teacher or teachers' aide.

C. The following factors shall be considered in making the determination whether the teacher, student teacher or teachers' aide has been rendered unfit for his position:

1. The liklihood that the activity or conduct may adversely affect students or school employees;

2. The proximity in time or place the activity or conduct to the teacher's student teacher's or teacher's aide's official duties;

3. Any extenuating or aggravating circumstances; and

4. Whether the conduct or activity is of a repeated or continuing nature which tends to encourage or dispose school children toward similar conduct or activity."

The trial court held that the statute reaches protected speech but upheld the constitutionality of the statute by reading a "material and substantial disruption" test into it. We disagree. The statute proscribes protected speech and is thus facially overbroad, and we cannot read into the statute a "material and substantial disruption" test. Therefore, we reverse the judgment of the trial court.

I

We see no constitutional problem in the statute's permiting a teacher to be fired for engaging in "public homosexual activity." Section 6-103.15 defines "public homosexual activity" as the commission of an act defined in Okla. Stat. tit. 21, § 886, that is committed with a person of the same sex and is indiscreet and not practiced in private. In support of their argument that this provision violates their members' right of privacy, plaintiff cites *Baker* v. *Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982), and *New York* v. *Onofre*, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980), *cert. denied*, 451 U.S. 987 (1981). Both of those cases held that the constitution protects consensual, noncommercial sexual acts in private between adults. *Baker* and *Onofre* are inapplicable to the instant case. Section 6-103.15 does not punish acts performed in private. Thus, the right of privacy, whatever its scope in regard to homosexual acts, is not implicated. *See Lovisi* v. *Slayton*, 539 F.2d 349 (4th Cir.), *cert. denied*, 429 U.S. 977 (1976).

The trial court correctly rejected plaintiff's contention that the Oklahoma statute is vague in regard to "public homosexual activity." In *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), the Court outlined the doctrines of facial overbreadth and vagueness. Regarding vagueness the Court said:

> "A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague, in violation of due process. To succeed, however, the complainant must demonstrate that the law is impermissibly vague in all of its applications."

455 U.S. at 497. Plaintiff makes no such showing. The Oklahoma cases construing the "crime against nature" statute have clearly defined the acts that the statute proscribes.[1]

[1] Section 886 provides: "Every person who is guilty of the detestable and abominable crime against nature, committed with mankind or

Plaintiff also argues that the statute violates its members' right to equal protection of the law. We cannot find that a classification based on the choice of sexual partners is suspect, especially since only four members of the Supreme Court have viewed gender as a suspect classification. *Frontiero* v. *Richardson*, 411 U.S. 677 (1973). *See also Baker* v. *Wade*, 553 F. Supp. 1121, 1144 n.58. Thus something less than a strict scrutiny test should be applied here. Surely a school may fire a teacher for engaging in an indiscreet public act of oral or anal intercourse. *See Amback* v. *Norwick*, 441 U.S. 68, 80 (1979). We also agree that the district court correctly rejected the Establishment Clause claim. *See Harris* v. *McCrae*, 448 U.S. 297 (1980).

II

The part of § 6-103.15 that allows punishment of teachers for "public homosexual conduct" does present constitutional problems. To be sure, this is a facial challenge, and facial challenges based on First Amendment overbreadth are "strong medicine" and should be used "sparingly and only as a last resort." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973). Nonetheless, invalidation is an appropriate remedy in the instant case because this portion of § 6-103.15

[1] (Continued)

with a beast, is punishable by imprisonment in the penitentiary not exceeding ten (10) years." The Oklahoma Court of Criminal Appeals has held that § 886 proscribes oral and anal copulation. *Berryman* v. *State*, 283 P.2d 558, 563 (Okla. Crim. App. 1955). In *Wainwright* v. *Stone*, 414 U.S. 21 (1973), the Court held that an almost identical Florida statute was not unconstitutionally vague because the Florida courts had specified that the statute applied to oral and anal copulation.

> "When a state statute has been construed to forbid identifiable conduct so that 'interpretation by [the state court] puts these words in the statute as definitely as if it had been so amended by the legislature,' claims of impermissible vagueness must be judged in that light."

414 U.S. at 23, citing *Winters* v. *New York*, 333 U.S. 507, 514 (1948).

is overbroad, is "not readily subject to a narrowing construction by the state courts," and "its deterrent effect on legitimate expression is both real and substantial." *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 216 (1975). Also, we must be especially willing to invalidate a statute for facial overbreadth when, as here, the statute regulates "pure speech." *New York* v. *Ferber*, 50 U.S.L.W. 5077, 5083-84 (U.S. July 2, 1982); *Broadrick*, 413 U.S. at 615.

Section 6-103.15 allows punishment of teachers for "public homosexual conduct," which is defined as "advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees." Okla. Stat. tit. 70, § 6-103.15(A)(2). The First Amendment protects "advocacy" even of illegal conduct except when "advocacy" is "directed to inciting or producing iminent lawless action and is likely to incite or produce such action." *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969). The First Amendment does not permit someone to be punished for advocating illegal conduct at some indefinite future time. *Hess* v. *Indiana*, 414 U.S. 105, 109 (1973).

"Encouraging" and "promoting," like "advocating," do not necessarily imply incitement to imminent action. A teacher who went before the Oklahoma legislature or appeared on television to urge the repeal of the Oklahoma anti-sodomy statute would be "advocating," "promoting," and "encouraging" homosexual sodomy and creating a substantial risk that his or her speech would come to the attention of school children or school employees if he or she said, "I think it is psychologically damaging for people with homosexual desires to suppress those desires. They should act on those desires and should be legally free to do so." Such statements, which are aimed at legal and social change, are at the core of First Amendment protections. As in *Erznoznik*, the statute by its plain terms is not easily susceptible of a narrowing construction. The Oklahoma

legislature chose the word "advocacy" despite the Supreme Court's interpretation of that word in *Brandenburg*. Finally, the deterrent effect of § 6-103.15 is both real and substantial. It applies to all teachers, substitute teachers, and teachers aides in Oklahoma. To protect their jobs they must restrict their expression. *See Erznoznik*, 422 U.S. at 217. Thus, the § 6-103.15 proscription of advocating, encouraging, or promoting homosexual activity is unconstitutionally overbroad.

We recognize that a state has interests in regulating the speech of teachers that differ from its interests in regulating the speech of the general citizenry. *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968). But a state's interests outweigh a teacher's interests only when the expression results in a material or substantial interference or disruption in the normal activities of the school. *See Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969). This Court has held that a teacher's First Amendment rights may be restricted only if "the employer shows that some restriction is necessary to prevent the disruption of official funcations or to insure effective performance by the employee." *Childers* v. *Independent School District No. 1*, 676 F.2d 1338, 1341 (10th Cir. 1982). Defendant has made no such showing.

The statute declares that a teacher may be fired under § 6-103.15 only if there is a finding of "unfitness" and lists factors that are to be considered in determining "unfitness": whether the activity or conduct is likely to adversely affect students or school employees; whether the activity or conduct is close in time or place to the teacher's, student teacher's or teachers aide's official duties; whether any extenuating or aggravating circumstances exist; and whether the conduct or activity is of a repeated or continuing nature which tends to encourage or dispose school children toward similar conduct or activity. An adverse effect on students or other employees is the only factor among those listed in § 6-103.15 that is even related to a material and substan-

tial disruption. And although a material and substantial disruption is an adverse effect, many adverse effects are not material and substantial disruptions. The statute does not require that the teacher's public utterance occur in the classroom. Any public statement that would come to the attention of school children, their parents, or school employees that might lead someone to object to the teacher's social and political views would seem to justify a finding that the statement "may adversely affect" students or school employees. The statute does not specify the weight to be given to any of the factors listed. An adverse effect is apparently not even a prerequisite to a finding of unfitness. A statute is saved from a challenge to its overbreadth only if it it is "readily subject" to a narrowing construction. It is not within this Court's power to construe and narrow state statutes. *Grayned* v. *City of Rockford*, 408 U.S. 104, 110 (1972). The unfitness requirement does not save § 6-103.15 from its unconstitutional overbreadth.

III

The parts of § 6-103.15 that deal with "public homosexual conduct" can be severed form the rest of the statute without creating a result that the legislature did not intend or contemplate. *See Tulsa Exposition and Fair Corp.* v. *Board of County Commissioners*, 468 P.2d 501, 507 (Okla. 1970); *see also Hejira Corp* v. *MacFarlane*, 660 F.2d 1356, 1362-63 (10th Cir 1981). We reverse the judgment of the district court, holding that the statute, insofar as it punishes "homosexual conduct," as that phrase is defined in the statute to include "advocating . . . encouraging or promoting public or private homosexual activity" is unconstitutional. We also hold that the unconstitutional portion is severable from the part of the statute that proscribes "homosexual activity," and we find that portion constitutional.

REVERSED.

BARRETT, Circuit Judge, dissenting:

I would affirm the district court's finding that 70 O.S. § 6-103.15 passes constitutional muster on every "front" challenged. The majority opinion renders the statute ineffective. It upholds the sanctions of the statute *only* if there is evidence proving that a teacher has engaged in "public homosexual activity" defined in 70 O.S. § 6- 03.15 (A.) (1.) (a.) and (b.).

The "punishment" referred to in the majority opinion which the majority holds may not be imposed on Oklahoma teachers is refusal of employment or reemployment, or dismissal or suspension *if* a teacher advocates, solicits, imposes, encourages or promotes "public homosexual activity" (which, by specific reference to the Oklahoma criminal code is distinctly identified as "the unnatual, perverse, detestable and abominable act of sodomy") in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees.

It is fundamental that state legislative bodies, in the exercise of state police power, may enact reasonable regulations in the interest of public health, safety, morals and welfare over persons within state limits. Oklahoma has, by enactment of the subject statute, endeavored to protect its school children and school employees from any teacher who advocates, solicits, encourages or promotes public or private *homosexual activity pinpointed as the commission of the unnatural and detestable act of sodomy.* 21 Okla. Stat. Ann. § 886 entitled "Crime against nature" provides: "Every person who is guilty of the detestable and abominable crime against nature, committed with mankind or with a beast, is punishable by imprisonment in the penitentiary not exceeding ten (10) years." Oklahoma has held that this section is not unconstitutionally vague even though it is general in its terms and circumstances, inasmuch as the terms convey adequate description of prohibited act or conduct to persons of ordinary understanding. *Carson* v. *State*,

529 P.2d 499 (Okla. Cr. 1974); *Canfield* v. *State*, 506 P.2d 987 (Okla. Cr. 1973), *appeal dismissed*, 414 U.S. 991 (1973), *rehearing denied*, 414 U.S. 1138 (1973); *Moore* v. *State*, 501 P.2d 529 (Okla. Cr. 1972), *cert. denied*, 410 U.S. 987 (1972). Oklahoma has clearly announced that the offense of sodomy is not to be countenanced within its borders. Federal courts should not function as superlegislatures in order to judge the wisdom or desirability of legislative policy determinations in areas that neither affect fundamental rights nor porceed along suspect lines. *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976).

In *Wainwright* v. *Stone*, 414 U.S. 21 (1973), the Supreme Court upheld a Florida statute which proscribed "the abominable and detestable crime against nature, either with mankind or with beast" against a constitutional challenge of void for vagueness. The Fifth Circuit had held the statute infirm as unconstitutionally vague and void on its face for failure to give adequate notice of the conduct forbidden by law. In reversing, the Supreme Court observed that copulation per os and per anum had long been held by Florida courts violative of the challenged statute as the "abominable and detestable" crimes against nature referred to in the statute. Hence, the Supreme Court found that the statute was subject to a narrowing construction.

The majority, unlike the district court, holds that portion of the statute which allows "punishment" for teachers for advocating "public homosexual conduct" to be overbroad because it is "not readily subject to a narrowing construction by the state courts" and "its deterrent effect on legitimate expression is both real and substantial." I disagree. Sodomy is *malum in se*, i.e., immoral and corruptible in its nature without regard to the fact of its being noticed or punished by the law of the state. It is not *malum prohibitum*, i.e., wrong *only* because it is forbidden by law and not involving moral turpitude. It is on this principle that I must part with the majority's holding that the "public homosexual conduct" portion of the Oklahoma statute is overbroad.

Any teacher who advocates, solicits, encourages or promotes the practice of *sodomy* "in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees" is in fact and in truth *inciting* school children to participate in the abominable and detestable crime against nature. Such advocacy by school teachers, regardless of the situs where made, creates a substantial risk of being conveyed to school children. In my view, it does not merit any constitutional protection. There is no need to demonstrate that such conduct would bring about a material or substantial interference or disruption in the normal activities of the school. A teacher advocating the practice of sodomy to school children is without First Amendment protection. This statute furthers an important and substantial government interest, as determined by the Oklahoma legislature, unrelated to the suppression of free speech. The incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest.

Tinker v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969) is a poor vehicle for the majority to rely upon. There, the Supreme Court simply held that school children opposed to the Vietnam conflict were protected under the First Amendment in their practice of wearing black arm bands in protest thereto, unless that conduct could be shown to substantially interfere or disrupt normal school activities. *Tinker* involved a symbolic demonstration involving a matter of national political signficance. Political expression and association is at the very heart of the First Amendment. The advocacy of a practice as universally condemned as the crime of sodomy hardly qualifies as such. There is no need to establish that such advocacy will interfere, substantially or otherwise, in normal school activities. It is sufficient that such advocacy is advanced in a manner that creates a substantial risk that such conduct will encourage school children to commit the abominable crime against nature. This finds solid support

in *Tinker, supra,* where the Court said "First Amendment rights must always be applied 'in light of the special characteristics of the . . . environment' in the particular case." 393 U.S. 503, 506.

The Oklahoma legislature has delared that the advocacy by teachers of homosexual acts to school children is a matter of statewide concern. The Oklahoma statute does not condemn or in anywise affect teachers, homosexual or otherwise, except to the extent of the non-advocacy restraint aimed at the protection of school children. It does not deny them any rights as human beings. To equate such "restraint" on First Amendment speech with the *Tinker* armband display and to require proof that advocacy of the act of sodomy will substantially interfere or disrupt normal school activities is a bow to permissiveness. To the same extent, the advocacy of violence, sabotage and terrorism as a means of effecting political reform held in *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969) to be protected speech unless demonstrated as directed to and likely to incite or produce such action *did not* involve advocacy of a crime *malum in se* to school children by a school teacher.

Facial overbreadth challenges are "manifestly strong medicine" which must be employed "sparingly and only as a last resort." *Broadrick* v. *Oklahoma,* 413 U.S. 601, 613 (1973). When a party asserts such a challenge, the overbreadth "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615. A statute's "plainly legitimate sweep" usually includes "controls over harmful, constitutionally unprotected conduct." *Id.* A broadly-worded statute which does deter some protected speech or conduct may not require invalidation if that deterrence can, with confidence, justfy such action. *Id.*

In *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967), the Supreme Court set down its initial guidelines for determining when deterrence of speech or conduct does or

does not justify invalidation of a statute. The Court held that a statute is overbroad if it proscribes speech or conduct which "merely advocates the doctrine in the abstract without any attempt to indoctrinate others, or incite others to action in furtherance of unlawful aims." *Id.* at 599-600. The Court drew a distinction between speech or conduct advocating an abstract doctrine or belief, which demands constitutional protection, and advocacy of unlawful action or acts, with the intent to incite, which deserves no such protection. *See also Communist Party of Indiana* v. *Whitcomb,* 414 U.S. 441, 444 (1974); *Brandenburg* v. *Ohio, supra; Yates* v. *United States,* 354 U.S. 298, 318-27 (1956). I submit that in the context of the Oklahoma public school system, the advocacy of sodomy by a teacher in a manner "that creates a substantial risk" it will come to the attention of school children deserves no First Amendment protection.

There is nothing abstract about a teacher advocating to school children the commission of the criminal act proscribed by section 886, *supra.* The expression proscribed by § 6-103.15 is the advocacy of the commission of the very act held to be a criminal act in *Canfield.* Thus, the deterred speech or conduct concerns "advocating," "promoting" and "encouraging" school children to commit the crime of sodomy. In the context of the public school system involving the teacher-student relationship, it cannot be said that the advocacy of such action is mere advocacy of an abstract doctrine or belief. *See Keyishian, supra* at 599-600. To hold otherwise ignores the difference between children and adults.

I would affirm.

APPENDIX B

[Filed June 29, 1982]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

THE NATIONAL GAY TASK FORCE and on behalf of all teachers and principals prospectively and presently employed by the Board of Education of the City of Oklahoma City, State of Oklahoma, and who are similarly situated, Plaintiffs,	)	No. CIV-80-1174-E
vs.	)	
THE BOARD OF EDUCATION OF THE CITY OF OKLAHOMA CITY, STATE OF OKLAHOMA, Defendant.	)	

William B. Rogers of Ames, Daugherty, Black, Ashabranner, Rogers & Fowler, 6440 Avondale Dr., Suite 200, Oklahoma City, Oklahoma 73116, counsel for plaintiff.

Eric J. Groves of Jernigan, Groves, Bleakley & Tague, 1200 North Shartel, Oklahoma City, Oklahoma 73103, counsel for defendant.

Fred Okrand and Susan McGreivy of ACLU Foundation of Southern California, 633 South Shatto Place, Los Angeles, California 90005, Amicus Curiae.

Sally E. Scott of the Commission on Freedom of Speech of the Speech Communication Association, 1600 Midland Center, Oklahoma City, Oklahoma 73102, Amicus Curiae.

MEMORANDUM OPINION AND ORDER

Before LUTHER B. EUBANKS, United States District Judge.

Before the Court for resolution is plaintiff's Motion for Judgment. There is no dispute as to the facts since plaintiffs claim the target statute is facially unconstitutional. The issues before this court have been fully briefed and the case is now ripe for final decision. The challenged statute, 70 O.S. §6-103.15, inter alia, provides:

A. As used in this section:

1. "Public homosexual activity" means the commission of an act defined in Section 886 of Title 21 of the Oklahoma Statutes, if such act is:

   a. committed with a person of the same sex, and

   b. indiscreet and not practiced in private;

2. "Public homosexual conduct" means advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees; and

3. "Teacher" means a person as defined in Section 1-116 of Title 70 of the Oklahoma Statutes.

B. In addition to any ground set forth in Section 6-103 of Title 70 of the Oklahoma Statutes, a teacher, student teacher or a teachers' aide may be refused employment, or reemployment, dismissed, or suspended after a finding that the teacher or teachers' aide has:

1. Engaged in public homosexual conduct or activity; and

2. Has been rendered unfit, because of such conduct or activity, to hold a position as a teacher, student teacher or teachers' aide.

C. The following factors shall be considered in making the determination whether the teacher, student teacher or teachers' aide has been rendered unfit for his position:

1. The likelihood that the activity or conduct may adversely affect students or school employees;
2. The proximity in time or place the activity or conduct to the teacher's, student teacher's or teachers' aide's official duties.
3. Any extenuating or aggravating circumstances; and
4. Whether the conduct or activity is of a repeated or continuing nature which tends to encourage or dispose school children toward similar conduct or activity.

It should be noted that plaintiff challenges the facial validity of the statute. Therefore, no set of facts is presented to this court.

Plaintiff alleges that the statute is unconstitutional because: it interferes with plaintiff's members right of free speech; it is vague and overbroad; it interferes with plaintiff's members right of privacy; it violates the equal protection clause; and it violates plaintiff's right to freedom of religion.

I. FREEDOM OF EXPRESSION

Although once thought otherwise, the United States Supreme Court recognized in *Keyishian* v. *Board of Regents*, 385 U.S. 589, 89 S.Ct. 675, 17 L.Ed.2d 629 (1966) that public employment could not be conditioned upon the giving up of fundamental rights. However, within certain limits, the government has the right to control the conduct and speech of its employees. *Perry* v. *Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).

The case most clearly enunciating these principles is *Pickering* v. *Board of Education*, 391 U.S. 563, 88 S.Ct. 1731 20 L.Ed.2d 811 (1968). Pickering, a school teacher, was dismissed after writing a letter to the local newspaper The letter was critical of the school board and school superintendent. There the court said:

> [I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State as an employer, in promoting the efficiency of the public services it performs through its employees. 391 U.S. at 568.

Although the *Pickering* Court declined to enumerate spesifically those factors that are to be weighed in arriving at the proper balance, the Court alluded to some general considerations which might show impairment of the governmental interest sufficient to activate the balancing test. Those factors include the government's interest in: removing incompetent employees; maintaining discipline by immediate superiors; preserving harmony among co-workers; and maintaining personal loyalty and confidence when necessary to a particular relationship.

In *Pickering*, the Court recognized that the plaintiff's statements were not directed toward any one person he was in daily contact with as a teacher and therefore no question of maintenance of discipline or harmony was present in the case. The court further said:

> What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either

> impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public. 391 U.S. at 572-573.

The United States Supreme Court has subsequently, by application, held that the State's interests outweigh a teacher's interests only where the expression results in a material or substantial interference or disruption in the normal activities of the school. *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). See also *Rampey* v. *Allen*, 501 F.2d 1090 (10th Cir. 1974). And in *Gay Alliance of Students* v. *Matthews*, 544 F.2d 162, 166 (4th Cir. 1976) the court recognized that the school "may regulate any conduct (homosexual or otherwise) which 'materially and substantially' disrupt[s] the work and discipline of the school."

Although the aforedescribed cases apply equally to expression inside and outside the classroom, there may be additional considerations when the teacher's expressions occur within the academic environment. For example, it has long been recognized that states, acting through local school boards, are possessed of the power to inculcate basic community values in students who are not mature enough to deal with academic freedom as understood or practiced at higher educational levels. *East Hartford Education Assoc.* v. *Board of Ed.*, 562 F.2d 838, 843 (2nd Cir. 1977). It has also been said that "[w]e need no recital literary authorities . . . to buttress the principle that the teacher, like any other citizen, is free to think as he likes, and to express those vews academically provided action is not advocated but merely adumbrated." *Aurora Ed. Assoc.* v. *Board of Ed.*, 490 F.2d 431, 434 (7th Cir. 1973).

The statute at issue, within its definition of conduct or activity, includes certain activities which are associated with expression. However, engaging in the activties enumerated in the statute will result in discipline only where the teacher is also found to be unfit. The factors to be considered in the determination of unfitness are akin to those factors cited in *Pickering*. The factors listed in the statute at issue are: the likelihood that the activity or conduct may adversely affect students or school employees; the proximity in time or place of the activity or conduct to the teacher's, student teacher's or teacher's aide's official duties; any extenuating or aggravating circumstances and; whether the conduct or activity is of a repeated or continuing nature which tends to encourage or dispose school children towards similar conduct or activity. As stated above, the interests cited in *Pickering* were: removing incompetent employees and maintaining discipline; preserving harmony; and maintaining personal loyalty and confidence. Therefore, based upon *Pickering*, the statute at issue presents legitimate concerns which the state may counter-balance against its employee's right to freedom of expression.

However, the factors considered in determining unfitness may not be read without reference to the overriding test of interference. Therefore, the crucial question is whether the expression contemplated by the statute substantially or materially interferes with the operation of the school. Only when substantial disruption is present is the employee's right of free expression outweighed, and therefore not constitutionally protected.

The Oklahoma Legislature chose to use the language "unfit to teach" rather than the language "materially or substantially disrupt." The question which this court must answer is whether an unfit teacher would materially disrupt normal school activities. It is apparent to this court that a teacher found unfit because of public homosexual activity or conduct would cause a substantial and material disruption of the school. It must be remembered that the statute

was primarily written to regulate the conduct of teachers. Any restraint of free expression is merely an ancillary subject of the statute. That is why the statute speaks of unfitness rather than of disruption. And even if one could claim that an unfit teacher is not disruptive, the case law is clear that a teacher may not be disciplined under this or any other statute for mere expression unless it materially or substantially interferes with the performance of his duties. Accordingly, the statute does not affect any speech protected by the First Amendment.

However, before the court ends its discussion of the statute's affect upon free expression, another of plaintiff's arguments should be discussed. Plaintiff contends that the statute "chills" its members from freely associating. In a United States Supreme Court case involving the lobbying act, the Court made the following statement:

> Hypothetical borderline situations are conjured up in which such persons choose to remain silent because of fear of possible prosecution for failure to comply with the Act. Our narrow construction of the act, precluding as it does reasonable fears, is calculated to avoid such restraint. But, even assuming such deterrent effect, the restraint is at most an indirect one resulting from self-censorship, comparable in many ways to restraint resulting from criminal libel laws. The hazard of such restraint is too remote to require striking down a statute which on its face is otherwise plainly within the area of congressional powers and is designed to safeguard a vital national interest. *United States* v. *Harriss*, 347 U.S. 612, 626, 74 S.Ct. 822, 98 L.Ed. 1009 (1953).

Is the present statute any different than a libel law? This court thinks not. Clearly the only "chilling" is caused by unreasonable fear.

Plaintiff's remaining arguments concerning the statute's affect upon free expression are unpersuasive because the

statute neither constitutes a prior restraint of protected expression nor allows discipline to a teacher for engaging therein.

II. OVERBREADTH AND VAGUNESS

Plaintiff contends that the statute suffers from both overbreadth and vagueness. Initially, plaintiff contends that the statute is clearly overbroad because on the one hand it applies to all expression which could be construed as advocating, soliciting, imposing, encouraging, or promoting homosexual activities and on the other hand it encompasses all expression of which there is a substantial risk that it will come to the attention of school children or school employees. Additionally, it is plaintiff's contention that the terms used in the statute (advocacy, soliciting, imposing, encouraging and promoting) are overbroad because they encompass constitutionally protected activity.

A statute may be overbroad if, in its reach, it prohibits constitutionally protected conduct. The crucial question is whether the statute sweeps within its prohibitions that which is protected under the First and Fourteenth Amendments. See *Grayned* v. *City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). Plaintiff has projected numerous hypothetical circumstances in which the statute would be unconstitutionally overbroad if so applied. However, the issue here is the facial overbreadth. Several courts have observed that a facial overbreadth adjudication is an exception to the traditional rules of practice and its function is a limited one from the outset. See, *Redbluff Drive-In, Inc.* v. *Vance*, 648 F.2d 1020 (5th Cir. 1981). Application of the overbreadth doctrine in this manner (where the plaintiff has not been injured by the statute's overbreadth) is manifestly strong medicine. The doctrine has been employed by the courts sparingly and only as a last resort. *Broadrick* v. *Oklahoma*, 413 U.S. 601, 93 S. Ct. 2908, 37 L.Ed.2d 830 (1973). In fact one Federal Court has recognized that the overbreadth doctrine takes on a special

meaning when regulations concerning public employment are involved.

> While the problem of overbreadth in the public employment sphere can raise First Amendment questions, [cite omitted] it does not necessarily require the same remedy as overbreadth in the criminal statutes; specifically, it does not require either a prohibition of any and all penalties, or striking down the regulation, since in matters pertaining to "efficiency of the service" it may be impossible to void a broadly-worded regulation. Deterrence of legitimate speech must be minimized by proper application of the prohibition to activity not protected by the First Amendment. *Waters* v. *Peterson*, 495 F.2d 91, 99 (D.C. Cir. 1973).

The statute at issue is not overbroad. The plaintiff's arguments have merit and would be persuasive if you consider only the first half of the statute. I have heretofore said that the statute does not place a prior restraint upon constitutionally protected speech. In fact, the statute merely provides that a teacher may be terminated if he engages in public homosexual conduct or activity and is found to be unfit to teach because of that activity. The statute specifically states what factors are to be considered in determining whether the activity causes the teacher to be unfit. Among the factors are: the activities' adverse affect on students and school employees; proximity in time or place of the conduct to the employee's official duties; and whether the activities are of a contining nature which tends to encourage children toward similar activity. Additionally, prior case law provides that a teacher may be disciplined only when his activities cause a substantial or material disruption of normal school activities. Therefore, the statute is facially free of restrictions on constitutionally protected conduct. Accordingly, the statute is not overbroad. And even if this court held the statute to be overbroad, invalidation of the statute would be improper according to *Waters*.

In addition to the overbreadth argument, plaintiff alleges that the statute is unconstitutionally vague. In particular, plaintiff alleges that the terms "public homosexual conduct" and "public homosexual activity" are not defined with sufficient specificity to provide an individual with fair warning of what is prohibted.

This court finds *Grayned, supra*, to be applicable here. In *Grayned*, the appellant was convicted of violating an anti-noise ordinance. The appellant had participated in a demonstration which occurred immediately adjacen to a school building. The ordinance read as follows:

> "[N]o person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof. . . ." 408 U.S. at 107-108.

In his appeal, appellant claimed that the ordinance was vague. The Court said regarding vague laws:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to " 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." 408 U.S. at 108-109.

In *Grayned*, the Court held that the anti-noise ordinance did not permit punishment for expression of unpopular views and therefore, contained no broad invitation to subjective or discriminatory enforcement. The Court recognized that the vagueness of the terms "noises and diversions" was dispelled by the ordinance's requirements. Those requirements were: that the noise or diversion be incompatible with normal school activity; that there be a relationship between the disruption that occurs within the school and that which occurs outside; and that the acts be willfully done.

As in *Grayned*, the vagueness of the terms "public homosexual activity" and "public homosexual conduct" is disspelled by the unfitness requirement. The vagueness, if any, is even further disspelled by case law requiring a substantial interference and by the list of factors which must be considered in determining unfitness. Those factors are: likelihood that the activity or conduct may adversely affect students or employees; the proximity in time or place of the activity or conduct to teachers, student teachers or teacher's aides official duties; any extenuating or aggravating circumstances; and whether the conduct or activity is of a repeated or continuing nature which tends to encourage or dispose school children toward similar conduct or activity. Certainly these requirements lend specificity to the terms "public homosexual conduct" and "public homosexual activity." A man of reasonable intelligence can certainly view the statute and determine which acts he should avoid. And the law provides sufficient guidelines that it may neither be arbitrarily applied nor inhibit the exercise of First Amendment freedoms. Accordingly, the statute is not unconstitutionally vague.

III. RIGHT TO PRIVACY

Although plaintiff has presented to this court a strong and detailed argument regarding the right of privacy, it has admitted that the United States Supreme Court has not extended the right of privacy to same-sex activity. However, plaintiff urges this court to extend that right to same-sex activity based upon an opinion by the highest appellate court of New York. *People* v. *Onofre*, 51 N.Y.2d 476, 415 NE2d 936 (1980).

The issue appeared settled in 1976 when the United States Supreme Court summarily affirmed a ruling that the Virginia sodomy statute was constitutional as applied to private, consensual homosexual behavior. See *Doe* v. *Commonwealth's Attorney*, 425 U.S. 901, 96 S.Ct. 1489, 47 L.Ed.2d 751 (1976) *aff'g* 403 F.Supp. 1199 (E.D. Va. 1975). However, the Court subsequently stated in a footnote to a 1977 plurality opinion: " 'the court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults,' . . . and we do not purport to answer that question now." *Carey* v. *Population Services Int'l*, 431 U.S. 678, 688 n.5, 97 S.Ct. 2010, 52 L.Ed.2d 75 (1977).

Since the Court's statement in *Carey*, the United States Supreme Court has not specifically addressed the question of whether the right of privacy extends to homosexual activity. A few courts, however, have attempted to answer the difficult question. One such attempt was *Onofre*.

Onofre concerned a constitutional challenge to the New York sodomy statute. This challenge was based upon the equal protection and the right to privacy provisions of the United States Constitution. The New York court held that there was no rational basis to exclude the protection of the right to privacy from those who "seek sexual gratification from what at least once was commonly regarded as 'deviant'

conduct, so long as the decisions are voluntarily made by adults in a noncommercial, private setting."

Although the New York court made a well-researched argument, the opinion is not controlling here because the target statute condemns public, not private homosexual activity. It is merely an opinion of a state appellate court and has no precedential value here. Additionally, that court held that there was no rational basis for not extending the right of privacy to same-sex activity rather than finding a rational reason for extending the protection.

This court is persuaded by the court's reasoning in *Doe, supra*. *Doe* involved a challenge to the Virginia statute making sodomy a crime. In *Doe* the court said:

> [t]hat Griswold is premised on the right of privacy and that homosexual intimacy is denuncible by the state is unequivocally demonstrated by Mr. Justice Goldberg in his concurrence, p. 499, 85 S.Ct. 1678 in his adoption of Mr. Justice Harlan's dissenting statement in *Poe* v. *Ulman*, 367 U.S. 497, 553, 81 S.Ct. 1752 1782, 6 L.Ed2d 989 (1961): 'Adultery, *homosexuality* and the like are sexual intimacies *which the state forbids* . . . but the intimacy of husband and wife is a necessarily essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. *It is one thing when the state exserts its power either to forbid extra marital sexuality* . . . or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.' 403 F.Supp. at 1201.

Although the right of privacy is an evolving constitutional doctrine, the Supreme Court has extended that protection only to the most basic, personal decisions. And the Supreme Court has not been quick to expand those rights

into new fields. See, *East Hartford* v. *Board of Ed.*, 562 F.2d 838 (2nd Cir. 1977). See also, *Johnson* v. *San Jacinto Jr. College*, 498 F.Supp. 555, 575 (S.D. Tex. 1980) (holding that an extra-marital relationship is not protected by the right of privacy and stating that the right to privacy in sexual intimacy is grounded on the marriage relation and the right of a person to do as they please with their body encompass aspects of sexual intimacy but does not protect the sexual relations themselves).

Therefore, it is the opinion of this court, based on the foregoing authority, that the right of privacy does not include the activities contemplated by the statute.

IV. EQUAL PROTECTION

Plaintiff, in addition to its other arguments, has alleged that the statute at issue violates the Equal Protection clause of the Fourteenth Amendment.

Before it may be determined whether the statute violates the equal protection clause, it must be determined what the appropriate standard of review is. Those statutes which affect a "suspect" classification or a "fundamental right" must be viewed with strict scrutiny. That is, the statute must be shown to further a compelling state interest before it will survive an equal protection challenge. However, if the statute does not affect a "fundamental right" or "suspect" classification, it must merely be shown to be rationally related to a legitimate state interest.

Initially, plaintiff argues that the statute affects its fundamental right to freedom of speech or that homosexuals are a "suspect" class. This court's analysis in the previous sections of this opinion is dispositive of plaintiff's claim that the statute involves First Amendment speech. Additionally, it should be noted that this court has ruled that the statute does not encompass activities which are entitled to a right of privacy.

It is also clear that homosexuals are not members of a protected class. Traditionally, only those classifications based on race, religion, national origin, or alienage had been considered suspect. And in *Frontiero* v. *Richardson*, 411 U.S. 677, 93 S.Ct. 1746, 36 L.Ed.2d 583 (1973) four members of the high court found sex be a suspect class. This court is not aware of any court decision which has held homosexuals to be a suspect class and is unwilling to do so itself in view of the Supreme Court'ts conservative stance regarding gender. See *Childers* v. *Dallas Police Dept.*, 513 F.Supp. 134, 147 n.22 (N.D. Tex. 1981); *Fricke* v. *Lynch*, 491 F.Supp. 381, 388 n.6 (D.R.I. 1980); *Adams* v. *Howerton*, 486 F.Supp. 1119, 1125 n.5 (C.D. Cal. 1980; *DeSantis* v. *Pacific Tel. & Tel. Co., Inc.*, 608 F.2d 327, 333, 334 n.1 (9th Cir. 1979).

Therefore, since the statute at issue does not affect a fundamental right or suspect class, the legislation need only bear a rational relationship to a legitimate state interest. It is clear that the legitimate state interest which the statute seeks to further is the fitness of public school teachers. In fact, the Supreme Court has recognized that a teacher's fitness is a legitimate state concern.

> There can be no doubt of the right of a State to investigate the competence and fitness of those whom it hires to teach in its schools, as this Court before now has had occasion to recognize. "A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern." *Adler* v. *Board of Education*, 342 U.S. 485, 493. There is "no requirement in the Federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness. Fitness for teaching depends on a broad range of factors." [cite omitted] *Shelton* v. *Tucker*, 364 U.S. 479, 485, (1960).

Therefore, this court must determine whether the statute at issue is rationally related to the aforementioned goal. One case sets forth very clearly the standards for review which have been enunciated by the Supreme Court of the United States. *National Organization for Reform of Marijuana Laws* v. *Bell*, 488 F.Supp. 123 (D.D.C. 1980). There, the court stated:

> "The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classification will be set aside only if no grounds can be conceived to justify them." *McDonald* v. *Board of Election Commissioners*, 394 U.S. 802, 809, 89 S.Ct. 1404, 1408, 22 L.Ed.2d 739 (1969). This standard of judicial review gives legislatures wide discretion and permits them to attack problems in any rational manner. *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). "In an equal protection case of this type. . . ., those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance* v. *Bradley*, 440 U.S. 93, 111, 99 S.Ct. 939, 950, 59 L.Ed.2d 171 (1979). The classification will be upheld unless "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [a court] can only conclude that the legislature's actions were irrational." *Id.* at 97, 99 S.Ct. at 943. "In short, the judiciary may not sit as a superlegislature to judge the wisdom of desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines. . . ." *New Orleans* v. *Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511 (1976). 488 F.Supp. at 134-35.

In this case, the plaintiff has fallen short of convincing the court that the legislature's action was irrational. Plaintiff only claims that the statute is not rationally related to a legitimate state goal because the School Board already had the power to dismiss teachers for unfitness. Therefore, plaintiff claims the statute was unnecessary.

It is not within the province of this court to determine whether the statute is superfluous. I must only determine whether the statute is rationally related to a legitimate state goal. As said previously, assuring the fitness of public school teachers is a legitimate legislative goal. The question is whether a statute which concerns public homosexual conduct is rationally related to the goal sought by the legislature. It is the opinion of this court that it is.

In Oklahoma, there is no adequate legislative history with which to determine legislative intent. Therefore, the legislature must be presumed to have acted constitutionally unless there are no grounds upon which to justify its action.

Obviously, the legislature has perceived that public homosexual conduct by a teacher might render him unfit to teach. This is not a totally irrational perception or a clearly erroneous idea. Courts across the nation have dealt with cases involving the discharge of teachers who either claimed to be homosexual or engaged in homosexual activities. See, e.g., *Acanfora* v. *Board of Ed. of Montgomery County*, 359 F.Supp. 843 (D.Md. 1973); *Morrison* v. *State Bd. of Ed.*, 82 Cal Rptr. 175, 461 P.2d 375 (1969); *Gaylord* v. *Tacoma School Dist. No. 10*, 88 Wash.2d 286, 559 P.2d 1340 (1977). See also *Singer* v. *United States Civil Service Comm'n*, 530 F.2d 247 (9th Cir. 1976), vacated and remanded 429 U.S. 1034, 97 S.Ct. 725, 50 L.Ed.2d 744 (1977),

(held Civil Service Commission could rationally conclude public knowledge that government employed a homosexual would impede efficiency of the Service) and *Norton* v. *Macy*, 417 F.2d 1191 (D.C. Cir. 1969) (recognizing that the homosexual conduct of an employee might bear upon efficiency).

Therefore, based upon the foregoing cases, the court holds that public homosexual activity likely would affect the efficiency of a teacher. Clearly a teacher's efficiency is related to the performance of his job and hence, his fitness to teach.

Accordingly, the court holds that the statute does not violate the equal protection clause of the United States Constitution because it is rationally related to a legitimate state goal.

V. ESTABLISHMENT CLAUSE

Lastly, plaintiff contends that the statute violates the establishment clause to the First Amendment of the United States Constitution. Plaintiff's claim is premised upon the fact that the statute is based upon Judaeo-Christian beliefs.

In support of the above argument, plaintiff cites two cases which recognize that a statute, based upon religious beliefs, is invalid unless it implements substantial interests beyond promoting the beliefs. See, *Hatheway* v. *Sec. of the Army*, 641 F.2d 1376 (9th Cir. 1981) and *McGowan* v. *Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961). Plaintiff claims that no legitimate, substantial interest for the statute may be found because of the Supreme Court decisions in *Griswold* v. *Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510, (1965) (holding that a statute which forbid the use of contraceptives violated the right of privacy); *Stanley* v. *Georgia*, 394 U.S. 557 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969) (holding that a law which made private possession of obscene material a crime violated the First Amendment); and *Eisenstadt* v. *Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 1029, (1972) (holding that a law which

provided dissimilar treatment for married and unmarried persons regarding the distribution of contraceptives violated the equal protection clause).

Defendant, on the other hand, contends that the statute serves a contemporary state interest in public education.

The United States Supreme Court has repeatedly recognized one method of determining whether a statute violates the establishment clause. Most recently that method was stated in *Larson* v. *Valente*, 50 U.S.L.W. 4411 (April 21, 1982).

> In *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), we announced three "tests" that a statute must pass in order to avoid the prohibition of the Establishment Clause. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances or inhibits religion, *Board of Education* v. *Allen*, 392 U.S. 236, 243 (1968); finally, the statute must not foster 'an excessive governmental entanglement with religion.' Walz [v. Tax Commisson, 397 U.S. 664, 674, (1970)]" 50 U.S.L.W. at 4417.

It would appear that only the first element of the above test is at issue here. In *McGowan*, the United States Supreme Court was asked to determine the validity of a Sunday closing law, also known as a blue law. Although the Court recognized that the law's original purpose was to aid religion, the court held the law to be valid because of the non-religious arguments asserted for closing on Sunday. The court said:

> However, it is equally true that the "Establishment" Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from religious considerations, demands such reg-

> ulation. Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judaeo-Christian religions while it may disagree with others does not invalidate the regulation. So too with the questions of adultery and polygamy. 366 U.S. at 442.

Therefore, it may be seen that merely because a law coincides with a religious belief does make the law violative of the establishment clause.

McGowan was most recently applied in *Harris* v. *McRae*, 448 U.S. 297, 100 S.Ct. 2671, 64 L.Ed.2d 784 (1980). *Harris* involved a challenge to the Hyde Amendment. The amendment severly limited the use of any federal funds to reimburse costs of abortions under the Medicaid program. The challenge, among other things, sought to invalidate the amendment because it incorporated into law the doctrine of the Roman Catholic Church concerning abortions. The Court said:

> The Hyde Amendment, as the District Court noted, is as much a reflection of "traditionalist" values towards abortion, as it is an embodiment of the view of any particular religion. 491 F.Supp., at 741. See also *Roe* v. *Wade*, 410 U.S., at 138-141. In sum, we are convinced that the fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause. 488 U.S. at 319-20.

Therefore, it is not enough to show that a statute merely coincides with a religious belief. There must also be showing that the statute remains religious in nature.

The case at hand is akin to *Harris*. In this case, the statute at issue is as much a reflection of the traditional values of Oklahoma citizens as it is the religious beliefs of any organization. However, this case differs slightly

from *Harris* because the plaintiff alleges that *Griswold*, *Eisenstadt*, and *Stanley* remove the statute from the field of secular action.

Although the Supreme Court did not address that argument in *Harris*, a district court addressed a similar argument. It was argued that there could be no secular action in view of *Roe* v. *Wade*. The court said:

> While *Roe* v. *Wade* argues for the measures' invalidity under the Fifth Amendment at least, it does not make the enactments any less secular in their legislative purpose. On its face such legislation, marking explicit disapproval of abortion in most cases, reflects a general and longheld social view even if, as has been held, it goes too far in excluding medically necessary abortions. *McRae* v. *Califano*, 491 F.Supp. 630, 741 (E.D.N.Y. 1980), *rev'd sub nom. Harris* v. *McRae*, 448 U.S. 297.

Therefore, based upon *McRae* and its subsequent decision in *Harris*, the statute at issue does not violate the Establishment Clause of the First Amendment to the United States Constitution. The statute does indeed reflect some christian beliefs while implementing traditional values but these things do not invalidate it.

My study of this statute convinces me that many of plaintiff's fears are unwarranted. The Act does not, for example, allow a school board to discharge, declare unfit or otherwise discipline

a. a heterosexual or homosexual teacher who merely advocates equality for or tolerance of homosexuality;

b. a teacher who openly discusses homosexuality;

c. a teacher who assigns for class study articles and books written by advocates of gay rights;

d. a teacher who expresses an opinion, publicly or privately on the subject of homosexuality; or

e. a teacher who advocates the enactment of laws establishing civil rights for homosexuals.

If, under the Act, a school board could declare a teacher unfit for doing any of the foregoing or refuse to hire one for similar reasons, it would likely not meet constitutional muster, but since protected expression is not hindered by the Act, I find that plaintiff has failed to demonstrate that it is unconstitutional on its face so deny plaintiff's motion for judgment.

Accordingly,

The prayer of the plaintiff for an order of this court to declare the aforesaid Act unconstitutional is denied.

The Clerk of the Court is directed to mail a copy hereof to counsel of record.

DATED this 29th day of June, 1982.

(s) Luther B. Eubanks
United States District Judge

APPENDIX C

[Filed May 11, 1984]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

THE NATIONAL GAY TASK FORCE and on behalf of all teachers and principals prospectively and presently employed by the Board of Education of the City of Oklahoma City, State of Oklahoma, and who are similarly situated,		
	Plaintiff/ Appellant	No. 82-1912
vs.		
THE BOARD OF EDUCATION OF THE CITY OF OKLAHOMA CITY, STATE OF OKLAHOMA,		
	Defendant/ Appellee.	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Board of Education of the City of Oklahoma City, the Defendant/Appellee, hereby appeals to the Supreme Court of the United States section II of the final order entered in this action on March 14, 1984.

This appeal is taken pursuant to 28 U.S.C. Sec. 1254(2).

By (s) *Larry Lewis*
Suite 410
4001 N. Lincoln
Oklahoma City, Oklahoma 73105
(405) 521-1276, 521-9033
Attorney for Defendant-Appellee

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